United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1506

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SAIA, a/k/a NICOLA SAIA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

RICHARD J. ARCARA
United States Attorney
Western District of New York
Attorney for Appellee
502 United States Courthouse
Buffalo, New York 14202

EDWARD J. WAGNER
Assistant United States Attorney
of Counsel

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L. GERALD KLEPS, REPRESENTATIVE
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GRANT HUBARD, CLERK
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IN THE

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No. 77-1506

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS SAIA, a/k/a NICOLA SAIA,
Defendant-Appellant.

On Appeal From the United States District Court
For the Western District of New York

BRIEF FOR THE APPELLEE

Preliminary Statement

The Government agrees with the preliminary statement in defendant's brief.

Statement of Facts

Empire Scrap Metal, Inc., a New York corporation, failed to file federal tax returns for the four year period from 1965 to 1968. After an investigation by the Internal Revenue Service in 1969, the Corporation filed delinquent returns for those four years.

Subsequent to this filing the defendant, treasurer of Empire Scrap Metals, Inc., and Salvatore Saia were charged with violating Title 26, U.S.C., §§ 7201 and 7206. Counts one and two alleged an attempt to evade and defeat income tax due and owing by Empire Scrap Metals, Inc. for the years 1966 and 1968. Counts three through six alleged a willful subscription to false tax returns for each of the four years in question in that gross receipts were understated and business expenses overstated.

Prior to trial, defendant made a motion to suppress the use of certain records and documents obtained by the Government as well as certain statements made by the defendant to IRS agents during the preliminary investigation of the Corporation. Judge John T. Curtin denied defendant's motion to suppress in all respects.

A jury trial commenced on March 8, 1977 and thereafter the jury returned a verdict of guilty on all six counts.

The facts developed at trial were summarized by Judge Curtin in his order denying defendant's motion for acquittal or new trial, and because of its brevity and accuracy the Judge's findings are set forth:

> "The Empire Scrap Metals, Inc. is a corporation which buys and sells scrap and valuable metals in the Western New York and neighboring Canadian area. Nicholas J. Saia is the owner and the principal officer of the corporation and is assisted by his brother, Samuel Saia, and his brother-in-law, Joseph Ruggiero. Samuel Saia was indicted but did not go to trial because of a serious health problem. The Government attempted to subpoena Joseph Ruggiero during the trial, but was unable to locate him and he did not appear as a witness. He was not charged.
>
> Sometime early in 1969, the Internal Revenue Service began an investigation of Empire Scrap Metals, Inc., when it was noted that no returns had been filed for the fiscal years ending August 31, 1965 through August 31,

1968. The corporation was contacted sometime in July 1969 when Nicholas J. Saia was interviewed. Arrangements were then made by Mr. Saia through accountants to prepare income tax returns for the corporation for the years in question. These returns were filed on or about December 3, 1969 and formed the basis for the present charges.

The Government proceeded by the specific items method. The books of the corporation were introduced into evidence, after which the Government called as witnesses customers who produced the records concerning their purchases from Empire Scrap Metals. In many instances the customers' records reveal that a number of purchases were not recorded in the Empire books. Because no Canadian witnesses appeared, I refused to permit the records of the Canadian companies to be introduced into evidence. As to these companies, the amounts represented in the defendant's books were assumed to be correct.

An analysis of the gross receipts of the corporation from the customers' records, when compared with the amount declared computed by use of the corporation's books, reveals that Empire Scrap failed to report over $100,000 in sales during the four years under investigation.

Defendant argues that the corporate books and records were improperly introduced into evidence. Considering all of the circumstances, the jury was entitled to find that the records introduced in court were prepared under the direction and supervision of the defendant and were properly in evidence.

In 1969 when the defendant learned that an investigation was going forward, he hired a bookkeeper[1] and directed her to prepare books and records for the periods 1965 through 1969. The defendant provided her with sales slips which were kept in cardboard boxes and

[1] Judge Curtin is referring to Government witness Carrie Grabiec.

told her to make up a cash receipts journal. However, while she was carrying out these duties, the defendant and his brother, Samuel Saia, told her to destroy certain records pertaining to sales in this time period and not to record them in the books. She also said that she had seen the defendant himself destroying similar records. It was for the jury to determine whether she was truthful.

After she left the corporation, her work was taken up by Nicholas Rizzo, an accountant, who was hired by the defendant to prepare the corporate tax returns. He completed Exhibits 6, 7, 8, and 9, the cash receipts journals, from the sales receipts which were kept in cardboard boxes. After Mr. Rizzo finished his work, Carl Justin, another accountant, and Richard Kametz prepared work sheets from these records. Both Mr. Justin and Mr. Kametz testified about their connection with the records and the work sheets. The work sheets were returned to Mr. Justin, who prepared the returns for Mr. Saia. They were then filed in the late fall of 1969.

John Cotter, a revenue agent, testified that he rechecked through the work sheets prepared by Mr. Kametz from the books and the returns of the corporation and found that this work had been done accurately. During cross-examination, defense counsel was able to bring out certain discrepancies in the testimony of each individual. At times it was difficult for the witness to recall exactly what had occurred. However, the jury was entitled to believe the testimony of the witnesses about how the records were prepared, what efforts the defendant took to see to it that all the sales were not recorded, and was also entitled to consider the books, records and work sheets as part of the evidence in the case.

Many of Empire's customers dealt with Joseph Ruggiero. They had often made checks to Ruggiero in return for the material delivered to them. These sales were connected with Empire in various ways. In some instances, the books and records of Empire coincided with the customer's transaction with Ruggiero. In other in-

stances, the customer testified that they were aware that they were doing business with Empire Scrap and that Ruggiero was an employee. In some cases, the customer had been instructed by Nicholas or Samuel Saia to make the checks to Joseph Ruggiero and, in others, before Ruggiero arrived, the customer had a telephone conversation with one of the Saias discussing the terms and the amounts of the sale. Finally, Vincent DiNatale, a special agent of the Internal Revenue Service, testified that during a meeting he had with the defendant, Nicholas Saia,[2] Mr. Saia told him that Mr. Ruggiero was a truckdriver and that he had the customers make checks payable to Ruggiero because he wanted to do business on a cash basis. Ruggiero cashed the checks and gave the money to Saia.

I have carefully reviewed the numerous points made in defendant's brief and find that they are not meritorious. No valid reason whatever is given why a new trial should be held. Both motions are denied."

Judge Curtin's Order of 11-10-77, denying defendant's post verdict motions. (Govt's Appx. 14 to 18).

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[2] It should be emphasized that Judge Curtin here is referring to the IRS Agents' initial contact with the defendant at his place of business in July, 1969 (See Defendant's Appx. pp. 1 to 17) resulting in admissions being made regarding certain corporate practices and the identification of certain corporate employees. These became material, of course, on the jury issue of the culpability of the individual defendant, his knowledge of and responsibility over the Corporation's activities, etc. This conversation with the defendant was initiated by the IRS Agents to investigate the income tax liabilities of the Corporation, Empire Scrap Metal, Inc. Judge Curtin denied defendant's motion to suppress the evidence obtained during this conversation with the defendant.

ARGUMENT

POINT I

Defendant admits that IRS guidelines (referred to as news releases 897 and 949) require a special agent to supply only an *individual* taxpayer with *Miranda*-type warnings. Failure to advise a corporate officer with such warnings during a preliminary investigation is not a violation of these procedural guidelines requiring suppression of any admissions made by the officer.

POINT II

The testimony of bookkeeper Carrier Grabiec of her knowledge of employees and practices of the defendant's Corporation and that the defendant told her to destroy certain records and alter books, was highly relevant and probative and was properly admitted by the District Court.

POINT III

There is no error, reversible or other, in the prosecutor's references in his opening and closing remarks to certain explanatory testimony of a Government witness.

POINT IV

The evidence was clearly sufficient and the jury's verdict should not be disturbed.

POINT I

Defendant admits that IRS guidelines (referred to as news releases 897 and 949) require a special agent to supply only an *individual* taxpayer with *Miranda*-type warnings. Failure to advise a corporate officer with such warnings during a preliminary investigation is not a violation of these procedural guidelines requiring suppression of any admissions made by the officer.

The ruling in the court below denying defendant's motion to suppress admissions made in the presence of IRS agent DiNatale was based on *Beckworth* v. *U.S.*, 425 U.S. 341 (1976). The interrogation producing the admission by defendant occurred in a non-custodial situation at which point defendant was not yet the focus of a criminal tax investigation for purposes of a *Miranda* warnings consideration.

Defendant contends that despite the clear applicability of *Beckworth* the Court should consider the IRS guidelines to require *Miranda*-type warnings to this taxpayer. Defendant attempts to distinguish the fact that these news releases do not apply to corporations by advancing the theory that the underlying purpose of the interrogation was to discover individual tax liability. It is defendant's contention that this purpose constituted trickery and deceit, rendering the admission suppressable under the 5th Amendment. This contention is clearly erroneous.

It has been firmly established that the news releases referred to apply only to individual taxpayers, not corporations, *U.S.* v. *Marciel*, 351 F. Supp. 817 (D.C.R.I., 1972); *Hale* v. *Henkel*, 201 U.S. 43 (1906). The testimony of Agent DiNatale explicitly indicates that his objective in interviewing appellant was to determine information as to Empire Scrap Metals, Inc. (Defendant's Appx. p. 1-2).

Defendant can point to no evidence disputing this purpose of the investigation. Rather, he advances the theory that despite the stated objective, there could have been no purpose but the investigation of the individual criminal liability of the defendant. This type of presumption has been specifically rejected in *Donaldson* v. *U.S.*, 400 U.S. 517 (1970). With reference to criminal tax prosecutions, the *Donaldson* court stated that:

> ". . . any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions. The fact that a full scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent." *Donaldson* at 534-535.

That is, the Courts have recognized that preliminary investigations are necessary predicates to full scale investigations in most instances. Here, the agents could not have been investigating the specific tax liability of defendant with regard to the taxable years in question as there were no returns filed on which to base any type of suspicion.

With regard to the admissions as to Mr. Ruggerio's employment and employment-related activities, the agent had no knowledge of what he would ultimately uncover. He was merely attempting to determine corporate employees. This is a legitimate objective of any corporate tax investigation.

Defendant argues that failure to warn a corporate officer of possible future culpability due to incriminating statements made by such officer "lull(s) him into a false sense of security." (Defendant's Brief, p. 9). It is argued that this does not serve to protect the individual's rights, bringing into play 5th Amendment objections based on the trickery and deceit of the Government. This position must be rejected.

A routine tax investigation may naturally have criminal overtones, and this very feature makes it "devoid of stealth or deceit" *U.S.* v. *Sclafani*, 265 F.2d 408, 414 (CA 2, 1959), cert. den. 79 S.Ct. 1436 (1959). "Before the Court of Appeals will find that evidence was obtained from defendant through trickery or deceit which materially misrepresent the nature of the inquiry, the record must disclose some affirmative misrepresentation, and this showing must be clear and convincing." *U.S.* v. *Dawson*, 486 F.2d 1326 (CA 5, 1973). Defendant has presented nothing indicating any misrepresentations by the agent. The July 24, 1969 questioning which elicited the testimony sought to be suppressed was undertaken at a time when the investigation was unquestionably in its preliminary stages, and was only the second meeting between defendant and Agent DiNatale. And as has already been noted, there were as yet no income tax returns filed.

In this case, defendant has the burden, requiring clear and convincing proof of such misrepresentation or deceit. *U.S.* v. *Prudden*, 424 F.2d 1021, 1032 (CA 5, 1970). This lacking, defendant's argument must fail, and Judge Curtin's decision not to suppress this evidence should not now be disturbed.

POINT II

The testimony of bookkeeper Carrie Grabiec of her knowledge of employees and practices of the defendant's Corporation and that the defendant told her to destroy certain records and alter books, was highly relevant and probative and was properly admitted by the District Court.

One Government Witness, Carrie Grabiec, testified concerning her responsibilities as a bookkeeper for the defendant's Corporation. (See Judge Curtin's summary of her testimony, Govt. Appx. pp. 16-17).

Briefly, Ms. Grabiec testified that defendant hired her in 1969 for the purpose of assisting him in preparing records so that he could file delinquent returns. The witness further testified that she was instructed by the defendant to exclude certain sales receipts from her records, and that she was told to either alter them or destroy them. She also testified about some other Corporate practices and her knowledge of the Corporate structure including Corporate employees.

Judge Curtin properly noted that this witnesses' testimony was a jury question; the jury, presumably, chose to believe her.

Frankly, the thrust of defendant's argument in Point II of his brief is not clear to the Government. Perhaps the defendant is arguing that Ms. Grabiec should not have been believed. This, again, is a jury question which went against the defendant and should not be relitigated by a Court of Appeals.

Possibly, defendant is arguing that the witnesses' testimony was not relevant, or if it was relevant that it was so prejudicial as to still be inadmissible under Rule 403 of the Federal Rules of Evidence. If this is the case, defendant has surely failed in his burden to demonstrate on appeal how Judge Curtin erred in allowing the witness to testify.

Defendant appears to assert error in that aspect of this witnesses' testimony concerning her knowledge of the practice of the Corporation, practices of altering or destroying sales slips, facts obviously relevant to the charge of submitting a fraudulent tax return and tax evasion. Here, defendant tends to misconstrue the witnesses' role. Hired by the defendant for bookkeeping purposes in 1969, the witness was told by defendant to prepare books and records for the years 1965 to 1969, but to destroy some of these records and overlook them in preparing the sales records for those years. Thus, the witnesses' testimony related to actions in 1969, not earlier years.

It was never suggested by the Government that this witness necessarily knew of Corporate practices in earlier years (although it is submitted a jury could draw reasonable inferences about the practices of the Corporation from her testimony); rather, Ms. Grabiec knew what went on in 1969, the year the defendant prepared a delinquent returns covering the Corporate activities for 1966 to 1968. It is hard to understand how defendant can now say her testimony should have been disallowed.

POINT III

There is no error, reversible or other, in the prosecutor's references in his opening and closing remarks to certain explanatory testimony of a Government witness.

Defendant contends that the testimony of IRS Agent Cotter, an expert Government witness who testified about a tax due and owing, was critical to the prosecution and that the opening and closing remarks of the prosecution were calculated to cause the jury to give undue weight and consideration to that testimony. This he deems to be reversible error.

The defendant cites no cases to support this proposition, and indeed it is as erroneous as it is unique. Mr. Cotter's function was properly explained to the jury by the prosecutor (Defendant's Appx. p. 27 & 28). His background and qualifications were established before he gave his actual testimony. This was a complicated case involving checks, invoices, accounting records and other business related matters, and Mr. Cotter aided the jury in understanding this evidence. In neither the opening or closing remarks was it suggested that this testimony be given unwarranted weight or consideration.

To constitute reversible error, the prosecutor's remarks must prejudicially affect substantial rights of the defendant, *Berger* v. *U.S.*, 295 U.S. 78 (1935).

In this case, there is not the slightest hint of any improper suggestion being made in the prosecutor's opening or summation. It is also significant that, as defendant admits, no objections were made at trial. Any argument now that reversible error was committed is totally without merit and must be rejected.

POINT IV

The evidence was clearly sufficient and the jury's verdict should not be disturbed.

It is respectfully submitted that defendant's position that the jury's verdict was contrary to the weight of the evidence is simply not supported by the record.

Judge Curtin competently summarized the Government's case (Govt. Appx. pp. 14 to 18) and it is suggested that to go through the entire record in this brief would be a needless exercise. Defendant argues on appeal issues that might properly be raised to the jury—questions of the weight to be given the Government's evidence, arguments about what inferences should be drawn, etc.—but which should fall on deaf ears at this appeal. It is correctly noted by the defendant that now the evidence must be considered in a light most favorable to the prosecution. This being the case, the defendant has fallen far short in his argument that the evidence was insufficient. In fact, his brief is merely a reargument of issues the jury rejected and which Judge Curtin rejected in denying defendant's post verdict motions. For this reason, this Court should also reject defendant's position.

Conclusion

For the foregoing reasons, the conviction of Nicholas Saia should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
Office and Post Office Address,
502 United States Courthouse,
Buffalo, New York 14202.

Edward J. Wagner,
Assistant United States Attorney,
of Counsel.

GOVERNMENT'S APPENDIX

Judge Curtin's Order of 11-10-77, Denying Defendant's Post Verdict Motions

UNITED STATES DISTRICT COURT
Western District of New York

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICHOLAS SAIA, a/k/a NICOLA SAIA,

Defendant.

CR-74-191

Appearances:

Richard J. Arcara, Esq., United States Attorney, (Richard E. Mellenger, Esq., of Counsel), Buffalo, New York, for the Government.

Harold Fein, Esq., Buffalo, New York, for the Defendant.

On April 7, 1977, the defendant was found guilty of six counts of tax law violations. Counts 1 and 2 charged him, as Treasurer of Empire Scrap Metals, Inc., with tax evasion for the fiscal years ending August 31, 1966 and August 31, 1968. Counts 3 through 6 charged him with willfully subscribing to an original corporate tax return which he did not believe to be true. These counts charged violations for the fiscal years ending August 31, 1965 through August 31, 1968. All four returns were filed on or about December 1, 1969.

Following the jury's verdict, defense counsel moved for judgment of acquittal and for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, respectively.

Defense counsel has filed a long and detailed brief claiming many points of error in the conduct of the trial and in the admission of evidence. In reaching a decision, I have also considered the Government's brief and oral argument.

Because of the jury's verdict, the defendant's motion must be denied if there is any evidence upon which a reasonable man might fairly conclude guilt beyond a reasonable doubt. *United States v. Taylor,* 464 F.2d 240, 253 (2d Cir. 1972). In addition, the evidence must be viewed in a light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60 (1942).

The Empire Scrap Metals, Inc. is a corporation which buys and sells scrap and valuable metals in the Western New York and neighboring Canadian area. Nicholas J. Saia is the owner and the principal officer of the corporation and is assisted by his brother, Samuel Saia, and his brother-in-law, Joseph Ruggiero. Samuel Saia was indicted but did not go to trial because of a serious health problem. The Government attempted to subpoena Joseph Ruggiero during the trial, but was unable to locate him and he did not appear as a witness. He was not charged.

Sometime early in 1969, the Internal Revenue Service began an investigation of Empire Scrap Metals, Inc., when it was noted that no returns had been filed for the fiscal years ending August 31, 1965 through August 31, 1968. The corporation was contacted sometime in July 1969 when Nicholas J. Saia was interviewed. Arrangements were then made by Mr. Saia through accountants to prepare income tax returns for the corporation for the years in question. These returns

were filed on or about December 3, 1969 and formed the basis for the present charges.

The Government proceeded by the specific items method. The books of the corporation were introduced into evidence, after which the Government called as witnesses customers who produced the records concerning their purchases from Empire Scrap Metals. In many instances the customers' records reveal that a number of purchases were not recorded in the Empire books. Because no Canadian witnesses appeared, I refuse to permit the records of the Canadian companies to be introduced into evidence. As to these companies, the amounts represented in the defendant's books were assumed to be correct.

An analysis of the gross receipts of the corporation from the customers' records, when compared with the amount declared computed by use of the corporation's books, reveals that Empire Scrap failed to report over $100,000 in sales during the four years under investigation.

Defendant argues that the corporate books and records were improperly introduced into evidence. Considering all of the circumstances, the jury was entitled to find that the records introduced in court were prepared under the direction and supervision of the defendant and were properly in evidence.

In 1969 when the defendant learned that an investigation was going forward, he hired a bookkeeper and directed her to prepare books and records for the periods 1965 through 1969. The defendant provided her with sales slips which were kept in cardboard boxes and told her to make up a cash receipts journal. However, while she was carrying out these duties, the defendant and his brother, Samuel Saia, told her to destroy certain records pertaining to sales in this time period and not to record them in the books. She also said that she had seen

the defendant himself destroying similar records. It was for the jury to determine whether she was truthful.

After she left the corporation, her work was taken up by Nicholas Rizzo, an accountant, who was hired by the defendant to prepare the corporate tax returns. He completed Exhibits 6, 7, 8, and 9, the cash receipts journals, from the sales receipts which were kept in cardboard boxes. After Mr. Rizzo finished his work, Carl Justin, another accountant, and Richard Kametz prepared work sheets from these records. Both Mr. Justin and Mr. Kametz testified about their connection with the records and the work sheets. The work sheets were returned to Mr. Justin, who prepared the returns for Mr. Saia. They were then filed in the late fall of 1969.

John Cotter, a revenue agent, testified that he rechecked through the work sheets prepared by Mr. Kametz from the books and the returns of the corporation and found that this work had been done accurately. During cross-examination, defense counsel was able to bring out certain discrepancies in the testimony of each individual. At times it was difficult for the witness to recall exactly what had occurred. However, the jury was entitled to believe the testimony of the witnesses about how the records were prepared, what efforts the defendant took to see to it that all the sales were not recorded, and was also entitled to consider the books, records and work sheets as part of the evidence in the case.

Many of Empire's customers dealt with Joseph Ruggiero. They had often made checks to Ruggiero in return for the material delivered to them. These sales were connected with Empire in various ways. In some instances, the books and records of Empire coincided with the customer's transaction with Ruggiero. In other instances, the customer testified that they were aware that they were doing business with Empire Scrap and that Ruggiero was an employee. In some cases, the customer had been instructed by Nicholas or Samuel Saia to

make the checks to Joseph Ruggiero and, in others, before Ruggiero arrived, the customer had a telephone conversation with one of the Saias discussing the terms and the amounts of the sale. Finally, Vincent DiNatale, a special agent of the Internal Revenue Service, testified that during a meeting he had with the defendant, Nicholas Saia, Mr. Saia told him that Mr. Ruggiero was a truckdriver and that he had the customers make checks payable to Ruggiero because he wanted to do business on a cash basis. Ruggiero cashed the checks and gave the money to Saia.

I have carefully reviewed the numerous points made in defendant's brief and find that they are not meritorious. No valid reason whatever is given why a new trial should be held. Both motions are denied. Defendant Nicholas Saia is directed to appear for sentencing on November 30, 1977 at 9:00 a.m.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: November 10, 1977

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss. :
City of Batavia)

USA vs. Nicholas Saia

77-1506

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 17th day of March, 19 78 I mailed copies of a printed ~~Bfs. & Appendices~~ in the above case, in a sealed, postpaid wrapper to:

10 Copies to A. Daniel Fusaro Esq.
Clerk, U. S. Court of Appeals -2nd Circuit
New Federal Court House
Foley Square
New York, N.Y. 10007

2 Copies to Salten Rodenberg Esq.
400 Walbridge Bldg.
Buffalo, N.Y. 14202

2 Copies to Harold Fein Esq.
245 Statler Hilton
Buffalo, N.Y. 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara Esq., U. S. Attorney, 502 U. S. Courthouse
Buffalo, N.Y. 14202 Att: Edward J. Wagner Esq., Asst. U. S. Atty.

Leslie R. Johnson

Sworn to before me this

17th day of March, 19 78

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 79